

**UNITED STATES
DISTRICT COURT**

**REPORT
ON
MEDIATION**

2000

I. INTRODUCTION

2000 was a year of reassessment and revision for the mediation program. After the negative feedback and results reported in the 1999 report, it became clear that the program had to be changed. With much work, the Mediation Plan was “overhauled” effective October 1, 2000. A completely new referral system was adopted, with the mediators selected by the attorneys and litigants. The “cap” on fees was eliminated. The approved mediators were given the option of accepting cases either directly from litigants or through referral by the mediation centers.

Relationship with Office of Dispute Resolution and Mediation Centers

With the changes in the referral procedures, the court's relationship with the mediation centers also changed. The court no longer refers cases “to” the centers, with only two exceptions, both of which are expected to be rare: A case may be referred through a center either at the request of a mediator or by the failure of the attorneys to designate a mediator. Although the court no longer has a direct tie to the mediation centers, many approved mediators continue to affiliate with centers and actively engage in mediation of other disputes through the centers, in addition to their federal cases.

Court's Staff

Kathy Griess continues to be the court's ADR Coordinator. She monitors the referral process and the progress of mediated cases. She also administers the application process for mediators, evaluations, statistics, and the surveys utilized in this report. Magistrate Judge Piester continues as the court's ADR Administrator.

Training

The annual workshop for federally approved mediators was held in Lincoln at the Hruska Center on September 29, 2000. Ms. Kimberlee K. Kovach, Professor of Law at the University of Texas, conducted a half-day skills workshop on particular difficulties in settling federal cases. The remainder of the day was spent reviewing the 2000 changes in the Mediation Plan and operations of the program. Twenty-six federal mediators and six mediation center staff members attended the workshop, which was funded by the Federal Practice Fund and the Office of Dispute Resolution's Training Institute. Carol Dart, the Institute's director, was instrumental in arranging this workshop, as she has in the past.

II. STATISTICS

The following pages are the "raw" quarterly and annual statistics for calendar 2000, followed by additional information.

Period: January 2000 - March 2000

	Centers	Private	Total
Referrals Pending Beginning of Period	4	5	9
Mediation Orders Entered	8	15	23
Mediation Orders Withdrawn	0	2	2
Settled Prior	1	0	1
Referrals Pending End of Period	5	10	15
Total Actually Mediated (Closures)	6	8	14
Cases Referred to Mediation by Division	Centers	Private	Total
Omaha	0	6	6
Lincoln	8	7	15
North Platte	0	2	2
Total	8	15	23
Outcome of Mediated Cases	Centers	Private	Total
Full Agreement	4	8	12
Partial Agreement	0	0	0
No Agreement	2	0	2
Total	6	8	14
Summary of No/Partial Agreement. After Closure	Centers	Private	Total
Trial Settings Pending at Beginning of Reporting Period	7	8	15
Settled	4	3	7
Judgment Entered Without Trial or Settlement	1	0	1
Transfer to Bankruptcy	0	0	0
Trials Held During Reporting Period	0	1	1
Trial Settings Pending at End of Reporting Period	4	4	8

Of the 2 cases that were mediated during the first quarter of 2000 and had no agreement, 1 case settled (center) and 1 case remains pending for trial (center) at the end of the reporting period. Of the 15 trial settings that were pending at the beginning of the reporting period, 7 cases settled (4 center and 3 private), 1 case had judgment entered without trial or settlement (center), 1 trial was held (private) and 8 cases are still pending for trial at the end of the reporting period (4 center and 4 private).

Period: April 2000 - June 2000

	Centers	Private	Total
Referrals Pending Beginning of Period	5	10	15
Mediation Orders Entered	8	11	19
Mediation Orders Withdrawn	2	1	3
Settled Prior	1	1	2
Referrals Pending End of Period	6	11	17
Total Actually Mediated (Closures)	4	8	12
Cases Referred to Mediation by Division	Centers	Private	Total
Omaha	1	3	4
Lincoln	6	6	12
North Platte	1	2	3
Total	8	11	19
Outcome of Mediated Cases	Centers	Private	Total
Full Agreement	3	7	10
Partial Agreement	0	0	0
No Agreement	1	1	2
Total	4	8	12
Summary of No\Partial Agreement, After Closure	Centers	Private	Total
Trial Settings Pending at Beginning of Reporting Period	4	4	8
Settled	3	1	4
Judgment Entered Without Trial or Settlement	0	0	0
Transfer to Bankruptcy	0	0	0
Trials Held During Reporting Period	0	0	0
Trial Settings Pending at End of Reporting Period	2	4	6

Of the 2 cases that were mediated during the second quarter of 2000 and had no agreement, both cases remain pending for trial (1 center and 1 private) at the end of the reporting period. Of the 8 trial settings that were pending at the beginning of the reporting period, 4 cases settled (3 center and 1 private), no trials were held and 6 cases are still pending for trial at the end of the reporting period (2 center and 4 private).

Period: July 2000 - September 2000

	Centers	Private	Total
Referrals Pending Beginning of Period	6	11	17
Mediation Orders Entered	7	6	13
Mediation Orders Withdrawn	1	0	1
Settled Prior	1	0	1
Referrals Pending End of Period	8	10	18
Total Actually Mediated (Closures)	3	7	10
Cases Referred to Mediation by Division	Centers	Private	Total
Omaha	2	3	5
Lincoln	5	1	6
North Platte	0	2	2
Total	7	6	13
Outcome of Mediated Cases	Centers	Private	Total
Full Agreement	3	4	7
Partial Agreement	0	0	0
No Agreement	0	3	3
Total	3	7	10
Summary of No\Partial Agreement, After Closure	Centers	Private	Total
Trial Settings Pending at Beginning of Reporting Period	2	4	6
Settled	1	0	1
Judgment Entered Without Trial or Settlement	0	0	0
Transfer to Bankruptcy	0	0	0
Trials Held During Reporting Period	0	0	0
Trial Settings Pending at End of Reporting Period	1	7	8

Of the 3 cases that were mediated during the third quarter of 2000 and had no agreement, all 3 cases remain pending for trial (3 private) at the end of the reporting period. Of the 6 trial settings that were pending at the beginning of the reporting period, 1 case settled (center), no trials were held and 8 cases are still pending for trial at the end of the reporting period (1 center and 7 private).

Period: October 2000 - December 2000

	Centers	Private	Total
Referrals Pending Beginning of Period	8	10	18
Mediation Orders Entered	1	7	8
Mediation Orders Withdrawn	2	1	3
Settled Prior	1	0	1
Referrals Pending End of Period	1	7	8
Total Actually Mediated (Closures)	5	9	14
Cases Referred to Mediation by Division	Centers	Private	Total
Omaha	0	2	2
Lincoln	1	5	6
North Platte	0	0	0
Total	1	7	8
Outcome of Mediated Cases	Centers	Private	Total
Full Agreement	3	9	12
Partial Agreement	0	0	0
No Agreement	2	0	2
Total	5	9	14
Summary of No\Partial Agreement, After Closure	Centers	Private	Total
Trial Settings Pending Beginning of Reporting Period	1	7	8
Settled	0	1	1
Judgment Entered Without Trial or Settlement	1	0	1
Transfer to Bankruptcy	0	0	0
Trials Held During Reporting Period	0	0	0
Trial Settings Pending at End of Reporting Period	2	6	8

Of the 2 cases that were mediated during the fourth quarter of 2000 and had no agreement, 1 case remains pending for trial (center) and 1 case had judgment entered without trial or settlement (center). Of the 8 trial settings that were pending at the beginning of the reporting period, 1 case settled (private), no trials were held and 8 cases are still pending at the end of the reporting period (2 center and 6 private).

Period: January 2000 - December 2000

	Centers	Private	Total
Referrals Pending Beginning of Period	4	5	9
Mediation Orders Entered	24	39	63
Mediation Orders Withdrawn	5	4	9
Settled Prior	4	1	5
Referrals Pending End of Period	1	7	8
Total Actually Mediated (Closures)	18	32	50
Cases Referred to Mediation by Division	Centers	Private	Total
Omaha	3	14	17
Lincoln	20	19	39
North Platte	1	6	7
Total	24	39	63
Outcome of Mediated Cases	Centers	Private	Total
Full Agreement	13	28	41
Partial Agreement	0	0	0
No Agreement	5	4	9
Total	18	32	50
Summary of No\Partial Agreement, After Closure	Centers	Private	Total
Trial Settings Pending Beginning of Reporting Period	7	8	15
Settled	8	5	13
Judgment Entered Without Trial or Settlement	2	0	2
Transfer to Bankruptcy	0	0	0
Trials Held During Reporting Period	0	1	1
Trial Settings Pending at End of Reporting Period	2	6	8

FOLLOW-UP SURVEYS

Survey questionnaires were sent to counsel in the 13 cases (for the period January 1, 2000 through December 31, 2000) which did not settle at the mediations, but which DID settle before trial, to determine if the settlements occurred "because of" the mediation, "in spite of" the mediation, or if the mediation had "no impact" on settlement. Responses were received from 23 attorneys in 13 cases. Results are below:

TOTAL **RESPONSES**: 23

	"Because Of"	"In Spite Of"	"No Impact"	Total
CENTERS	3	2	9	14
PRIVATE ¹	5	0	4	9
TOTAL	8	2	13	23

CASES REPORTED ON: 13

CENTERS	2	2	4	8
PRIVATE	2	0	3	5
TOTAL	4	2	7	13

It is commonly thought that even a "failed" mediation (that is, one that does not end in settlement "at the table") may spawn fruitful settlement discussions in the future. That is not necessarily true based on these limited numbers, as mediation was reported by the lawyers to have had "no effect" on settlement in seven of thirteen cases that settled later.

¹ The "private" designation means only that the referral was made directly to the mediator and not through a mediation center. Many, perhaps a majority, of the "private" mediations were done by the court's approved mediators. Others were done by people who have not been formally approved by the court acting as neutrals.

III. OBSERVATIONS ON THE NUMBERS:

MEDIATION "CAUSED" SETTLEMENT IN 90% OF THE CASES MEDIATED:

Adding the cases settled at the mediations (41) and those later settled "because of" the mediation (4) yields a total of 45 of the 50 cases actually mediated (90%) were settled directly because of the mediation program. Calculated according to Centers/Private, the rates are: Centers: $15/18 = 83\%$; Private: $30/32 = 94\%$.

Effects of Mediation on Settlement, 2000:

	Cases Mediated	Settled AT Mediation	Settled Because of Mediation	Total Cases Settled	Effective Rate of Settlement
Centers	18	13	2	15	83%
Private	32	28	2	30	94%
Totals	50	41	4	45	90%

In addition, five cases were settled after the entry of the mediation reference order but before the scheduled mediation. It is not known what effect (if any) the impending mediation had on settlement in those cases, but it would not seem likely to have been negative. Finally, it should be noted that of the total of 59 case referrals (those pending Jan. 1, 2000 plus those actually mediated in 2000), only one case had been tried and only eight cases remained set for trial at the end of the period.

There were two cases mediated in 2000 in which counsel reported that settlement occurred "in spite of" the mediation. Obviously, this is a concern, for the mediation should not "harm" the settlement horizon for any dispute. This should be addressed in the training and renewal applications of the mediators.

COMPARISONS TO PRIOR PERIODS:

Number of Cases Referred: Roughly the same number of mediation reference orders were entered in 2000 as in prior years. However, it should be noted that there are more mediations taking place than the court orders. Litigants often simply contact a mediator, either an approved mediator or one not approved by the court, and arrange a mediation without the court's involvement. Thus, these numbers are not an accurate reflection of mediation activity in Nebraska or in federal court cases. Efforts are underway to improve this reporting.

Geography: Most of the mediation reference orders are continuing to emanate from Lincoln. This has been consistent over the course of the program (1998: Of 65 orders, 44 were from Lincoln, 11 from Omaha, and 10 for North Platte Cases; 1999: Of 67 orders, 41 were from Lincoln, 20 from

Omaha, and 6 in North Platte cases; 2000: Of 63 orders, 39 were from Lincoln, 17 from Omaha and 7 for North Platte).

Private Referrals: The number of private referral orders continued at roughly the same rate relative to the total number of referrals. (35/65 in 1998; 41/67 in 1999; 39/63 in 2000). Again, it is believed that there were more actual mediations of federal cases by means of individual contact by the litigants than are recorded by these numbers.

Settlements: The “effective settlement rate” improved dramatically in 2000, also raising the average for the duration of the mediation program. The rates of settlement for the history of the program are shown below:

	Centers				Private				Totals				
	'97 ²	'98	'99	'00	'97	'98	'99	'00	'97	'98	'99	'00	ALL
MRO's Entered	111	30	26	24	30	35	41	39	141	65	67	63	336
Cases Mediated	83	22	19	18	21	28	37	32	104	50	56	50	260
Cases Settled In Mediation	27	10	6	13	9	14	27	28	36	24	30	41	131
	33%	46%	32%	72%	43%	50%	73%	88%	35%	48%	54%	82%	50%
Effective Settlement Rate	45%	73%	37%	83%	61%	75%	78%	94%	47%	74%	64%	90%	62% ³

² “1997” includes all prior reporting periods from October, 1995.

³ Calculated as follows: Effective Settlement Rates for the centers for the four periods were: 41/92; 16/22/ 7/19; 15/18 = 75/151 = 50% overall. For private mediations the figures are 11/18; 21/28; 29/37; 30/32 = 91/155 = 79%. Combined, the figures are 166 cases settled because of mediation out of 266 cases actually mediated, or 62.4%. (The discrepancy of six cases in the total number mediated is a result of adjustments to the 1997 statistics due to errors). At the end of 1999 the overall settlement rate attributable to mediation was 58%, so this years numbers have raised the overall average.

IV. EVALUATIONS

After each mediation the participants were asked to complete an evaluation form, judging various aspects of their mediation from 1 (Excellent!) to 5 (Terrible!). (Copies of the evaluation forms are in the Appendix). They were asked to either give it to the center or mail it back to the court. Averaged responses to some of the questions are set forth in chart form below.

EVALUATION QUESTION	*PTY-CTRS	SAME 1999 AVE	PTY-PVT	SAME 1999 AVE.	ATTY CTRS	SAME 1999 AVE	ATTY PVT	SAME 1999 AVE.	OVRL AVE	SAME 1999 AVE.
"How was the mediator at remaining neutral?"	1.29	1.72	1.38	1.27	1.50	1.44	1.39	1.35	1.45	1.53
"During the mediation session, how was the mediator-- ...at giving you opportunities to express your views?"	1.29	1.76	1.25	1.00	1.40	1.40	1.25	1.18	1.39	1.39
"...at understanding your/ your client's interests and needs in the dispute?"	2.00	2.00	1.36	1.15	1.67	1.64	1.31	1.24	1.66	1.61
"...at allocating appropriate time for the mediation?"	1.67	1.86	1.38	1.36	1.83	1.92	1.52	1.41	1.70	1.71
"...at treating you with fairness and respect?"	1.14	1.41	1.14	1.04	1.20	1.36	1.22	1.06	1.25	1.27
"How well were the legal issues of the case identified and discussed during the session?"	1.71	1.79	1.71	1.69	1.60	1.63	1.64	1.71	1.84	1.72
"Overall, how would you rate the mediation process in your case?"	1.57	2.52	1.70	1.27	1.50	2.20	1.57	1.32	1.84	1.99
"From this experience, how satisfactory do you think mediation is to resolve other disputes in which you might be involved?"	1.67	2.41	1.65	1.42	1.80	1.96	1.48	1.62	1.83	1.95
"How efficient was the procedure of court referral and arranging the mediation session?"	2.33	1.72	1.80	1.50	2.50	1.75	1.91	1.73	2.00	1.70

* "PTY-CTRS" means "Parties and Insurers--Center Mediations." "PTY-PVT" means "Parties and Insurers--Private Mediations." "ATTY CTRS" means "Attorneys--Center Mediations." "ATTY PVT" means "Attorneys--Private Mediations" "OVRL AVE" means "Overall Average." "SAME 1999 AVE" means "The 1999 Average for the same question as the previous column."

Although it is difficult to draw any firm conclusions on this small number of mediations, some generalizations from the chart are possibly these: The mediation referrals through the centers were not regarded as being as efficient as the private office referrals; the “overall” rating for individual mediations improved dramatically for the center mediators, among both parties/insurers and attorneys; the category of “worst” evaluations, with an overall average of 2.00 (“Good”) was the efficiency of the court's referral procedures.

Interestingly, the participants' perceptions of the quality of the mediation and the mediator did not change much depending on whether or not the case settled “at the table.” Classed by whether the case settled at the mediation, the evaluations yielded these averages:

EVALUATION QUESTION	CASE DID SETTLE IN MEDIATION SESSION			CASE DID NOT SETTLE IN MEDIATION SESSION		
	PRTY	ATTY	AVE	PRTY	ATTY	AVE
"How was the mediator at remaining neutral?"	1.33	1.40	1.37	2.00	1.50	1.75
"During the mediation session, how was the mediator-- "...at giving you opportunities to express your views?"	1.38	1.24	1.29	1.27	1.50	1.25
"...at understanding your/your client's interests and needs in the dispute?"	1.39	1.34	1.37	1.50	1.50	1.50
"...at allocating appropriate time for the mediation...?"	1.41	1.57	1.49	1.50	1.50	1.50
"...at treating you with fairness and respect?"	1.15	1.21	1.18	1.00	1.25	1.13
"How well were the legal issues of the case identified and discussed during the session?"	1.67	1.64	1.66	2.50	1.50	2.00
"Overall, how would you rate the mediation process in your case?"	1.63	1.48	1.56	2.50	2.67	2.59
"From this experience, how satisfactory do you think mediation is to resolve other disputes in which you might be involved?"	1.64	1.49	1.57	3.00	2.00	2.50
"How efficient was the procedure of court referral and arranging the mediation session?"	1.85	2.03	1.94	2.00	1.50	1.75

As can be seen from these numbers, the parties and insurers were slightly more likely to alter their views on the value of the mediation depending on its outcome, and their variances were quite significant on three of the last four questions. The lawyers were fairly consistent in all but the last three questions.

Another issue is always whether the settlements achieved during the mediations would have eventually occurred anyway, without any mediation or court involvement. This question is asked on the evaluation questionnaires now being used. Nearly ALL participants indicated that the settlement reached either would not have otherwise occurred or would have occurred only later, after the expenditure of more time and money:

“If you reached full settlement, in your view would the case have settled later without mediation?”

Attorneys “Yes”	Attorneys “No”	Attorneys- “Maybe”	Parties/Insurers “Yes”	Parties/Insurers “No”	Parties/Insurers “Maybe”
16/38 =42%	20/38=53%	2/38=5%	11/26=42%	14/26=54%	1/26=4%

While obviously there is no way of scientifically knowing the answer to that question, these results, from the people most familiar with the case, are impressive indicators of the effectiveness of the mediation.

In addition, participants were asked to state if they thought the mediation saved them time and/or money in resolving the case. The results, shown in the table below, indicate averages between “excellent” and “good.” They were then asked to quantify how much time and/or money was saved by resolving the case when they did. Those “guesstimates” have been averaged; recognizing, however, the non-scientific nature of these figures, the highs and lows were not calculated in the money averages.⁴

EVALUATION QUESTION	PRTY	ATTY	AVE
“To what extent do you think the mediation saved you money in resolving this case?”	2.00	1.84	1.92
“Please ‘guesstimate’ how much money saved”	\$22,382.35	\$20,682.00	\$21,532.18
“To what extent to you think mediation saved you time in resolving this case?”	1.48	1.49	1.49
Please ‘guesstimate’ how much time saved, i.e. hours of attorney time”	219.33 Hours	109.17 Hours	164.25 Hours

Thus, although these numbers may be too small to reach a valid conclusion, it appears that mediation "may" provide a more effective opportunity not only to reach settlement, but also to do so early enough to save significantly on both time and litigation costs.

An additional aspect of mediation which continues to be reflected in the evaluation responses is the element of the litigants having an opportunity to "be heard" by a neutral person, and gaining

⁴ Money Saved--Attorneys: Two figures of \$300,000 and \$200,000 and anything under \$10,000 were thrown out, as most responses were between \$10,000 and \$40,000.

Money Saved--Parties/Insurers: One figure of \$800,000 and one low figure of \$1,000 were thrown out..

Time Saved--Attorneys: This average includes a high estimate of 500 hours and a low estimate of 15 hours.

Time Saved--Parties/Insurers: This average includes a high estimate of 2,500 hours, one low estimate of 3 hours and one low estimate of 8 hours.

understanding of their opponent's positions and interests in resolving the dispute. This "feel good" element is reflected in the questions evaluating the mediator's treatment of the parties, understanding their "interests and needs" in the case, and the extent to which the legal issues were discussed. These indicators are consistently positive, even when the case did not settle at the table. Thus, it seems to be one of the benefits of mediation.

V. CONCLUSIONS

The mediation program continues to be a **positive force toward settlement**. The past year's statistics indicate that mediation caused or accelerated settlements in an overwhelming majority of cases referred. The "effective settlement rate" has gone up and down over the five years of the program, but the overall average is that nearly two-thirds of referrals result in settlements attributable to mediation.

The evaluations continue to suggest that **mediation receives positive feedback**. Even if the case did not settle, the evaluations reflect generally very high averages. Mediation by a trained neutral who listens gives the parties the satisfaction of being "heard" and hopefully, "understood." While not a traditional function or role played by lawyers, this cathartic element is instrumental in bring parties to the point of willingness to settle. By allowing litigants to try to resolve "their" problem themselves, mediation permits parties to be in control of how their dispute is ended.

A tentative conclusion is that **mediation saves litigants time and money**. While it may be too soon to shout this one from the rooftops, at least anecdotally the reports from lawyers and parties tend to overwhelmingly indicate it. Further, the savings "guestimated" are significant.

The court continues to make **relatively few case referrals**. It is disappointing that the program has apparently not been popular with some lawyers, particularly in Omaha, where a majority of the court's approved mediators reside and practice. Some attribute this to the demise and reorganization of the Omaha mediation center, and the Omaha bar's own mediation efforts. However, even the Lincoln docket shows relatively few referrals. Whether this will change with the new referral system of attorneys contacting the approved mediators directly remains to be seen.

The court's program has also been a catalyst for the development of a **private market of mediators**, something that did not exist at the commencement of the program and was then identified as a goal. Several of the court's approved mediators have a personal following among litigants and a successful mediation practice apart from the cases referred by this court. It is expected this will continue as mediation generally gains favor and familiarity.

The court's program also provides a mechanism for attorneys who are interested in becoming mediators to augment their skills through the "Fed/Med" training and the **annual skills workshops** for approved mediators. While a "continuing education" requirement is not imposed on approved mediators, most have participated in the annual skills workshops and rate their usefulness highly.

VI. FUTURE OUTLOOK

Changes in 2000:

The 2000 amendments to the Mediation Plan give attorneys and litigants their **choice of mediators**. This was a major concern in the past. Attorneys understandably would prefer a "known commodity," someone they know either professionally, personally, or by reputation. As this report is being written, the court is developing a **web site** listing approved mediators and some of their qualifications to help attorneys and litigants choose the person they prefer as their mediator.

In addition, approved mediators' **fees are no longer capped**. Mediators can charge whatever they choose. In addition, mediators may charge **travel expenses** separately, and may charge a non-refundable "**scheduling fee**" if the mediation, once arranged, does not occur. It is hoped these changes will remove the problem of some active mediators not being able to "afford" to take cases from federal court.

Finally, the 2000 changes include requirements of **higher qualifications for mediators** to be approved by the court. The plan now requires a 24-hour course of training in addition to the mediator's basic mediation training, and more litigation experience. It is hoped these qualifications will serve to set the "approved" mediators apart from others and more fully ensure mediator competence.

The court's annual skills workshops will be continued in 2001, and another "Fed/Med" training program for new mediators may be offered if sufficient interest is shown. It is hoped that these educational meetings will contribute to the growth of mediation as a viable alternative to litigation and a reasonable means to resolve disputes.

The court has contributed to the development of mediation as a viable alternative dispute resolution technique in Nebraska. The statistics accumulated over the course of the court's program do demonstrate that mediation is definitely worthy of consideration in civil cases. Whether it continues as a viable force or even expands will depend upon the acceptance of the bench and bar and the continuing efforts of mediators to provide competence and fairness in the mediation process.

APPENDIX

1. EVALUATIVE COMMENTS, 2000
2. EVALUATION QUESTIONNAIRES
3. MEDIATION PLAN
4. APPLICATION FOR APPROVAL

EVALUATIVE COMMENTS, 2000

1. PARTIES' COMMENTS RECEIVED ON EVALUATION FORMS

The evaluation forms were distributed to participants in the mediations held through the auspices of the mediation centers as well as the private mediations. The comments received from the parties and insurance company claims representatives appear below:

In Cases That Did Settle During the Mediation Session (Center):

No comments were received.

In Cases That Did Settle During the Mediation Session (Private):

"At the very beginning of the mediation R&D Systems suggested purchasing Streck as a settlement of this case. The mediator championed this suggestion which I thought was inappropriate. We had come to mediate patent infringement, not sell our company. Also the mediator spent a great deal of his time in the hall. I think he could have been better utilized in our discussions."

"_____ was clear, understanding & _____. I greatly appreciated all he did to get this _____ behind me. _____ was great."

"_____ does a great job."

"_____ does a great job. He has credibility with the lawyers and the clients."

"_____ did an excellent job."

"Good job."

"This was my first exposure to the mediation process. It is difficult to assess this process since this is my first mediation. Hopefully – this will be my last mediation!"

In Cases That Did Not Settle During the Mediation Session (Center):

No comments were received.

In Cases That Did Not Settle During the Mediation Session (Private):

No comments were received.

2. ATTORNEYS' COMMENTS RECEIVED ON EVALUATIONS

In Cases That Did Settle During the Mediation Session (Center):

"As always, I thought _____ did a great job in settling this matter."

In Cases That Did Settle During the Mediation Session (Private):

"Case settled more because of a direct discussion between the plaintiff and defendant claim handles, outside presence of counsel and mediator. Mediation allowed for the direction discussion which settled the case."

"Particularly helpful that the mediator was a patent lawyer, familiar with both patent law and the relevant science and technology. I attribute most apparent "slowness" during this mediation process to the time needed by the other side to arrive at positions rather than as a function of the mediator, who appeared to give each side the time it needed to respond to a position/option advanced by the other side."

"Good job by mediator - well prepared."

"In my opinion it is necessary for the mediator to be an experienced lawyer."

"Depends a lot on skill & work resolve of mediator."

"The mediation process in this case was more similar to a traditional settlement conference with the mediator shuttling between the two parties rather than leading a joint effort to find a common ground as is stressed in mediation training. The attorneys (at least one of them) seemed to have a hard time stepping aside from their traditional role as advocate to moderate their opinion enough to reach consensus. Perhaps there is a certain amount of defending prior opinions expressed to clients, that works against more traditional mediation techniques. Here, the offer-counteroffer back & forth dickering succeeded because the parties were motivated by the economics of the case (high cost & modest recovery potential)."

"The mediator's pace was fine. The start of mediation was delayed because of defendant's failure to have a decision maker present with full authority to meet plaintiff's last demand."

"_____ is the very best mediator there is. Period. I have had more than a dozen mediations w/him and they have all settled very fairly. I use him whether I am plaintiff or defense."

"_____ does a nice job."

"Excellent. We may have arrived at a settlement/not this fast or efficient. Good to air dirty laundry – particularly this case. Non-monetary issues were addressed very well."

"This is the second time I have used _____ and am extremely pleased with both results."

"If the goal is that each party comes away equally unhappy, I think we reached that goal. But I think everyone can live with the settlement, even though perhaps no one is delighted with it."

"_____ did a great job – about the best we've seen!"

"_____ is extremely prepared and approaches in a very pragmatic fashion."

In Cases That Did Not Settle During the Mediation Session (Center):

No comments were received.

In Cases That Did Not Settle During the Mediation Session (Private):

No comments were received.

3. LAWYERS' COMMENTS RECEIVED IN FOLLOW-UP SURVEY

The survey, sent in cases that had settled but not during the mediation session, requested attorneys to comment on the effects of the mediation in their case, as well as their views on "interest-based" mediation. Those comments follow.

Centers: "Because Of":

"I was not retained by the Defendant until after mediation, but because of the position of the parties revealed at mediation, it was apparent that with a little more work the case was likely to settle and that is what occurred."

"Questions unanswered at time of mediation were clarified in depositions."

"Various aspects and issues regarding both liability and damages were discussed. This helped both sides to hear and understand each others positions, points and attitudes."

"Clearly, the mediation was instrumental in bringing the parties to settlement. Mostly a change in attitudes."

"Mediation can be a useful tool to accomplish settlement. Magistrate Piester conducted a fair and open mediation proceeding that I believe both parties appreciated."

Centers: "In Spite Of":

"The other side was not prepared for mediation. They were completely unfamiliar with the facts of the case. They had done no discovery prior to the mediation. The corporate individual that they brought to the mediation had no authority to resolve the matters and was, in fact, one of the primary actors in the discrimination complained of in the complaint. The defendants had failed to disclose insurance

until the day before the mediation when they asked that the insurance company representative not have to be present. The insurance company name and policy limits were never disclosed before nor during the mediation and were only finally disclosed right before the settlement conference before Judge Kopf. The defendants at the mediation refused to negotiate and came up with a figure which was almost one-third of what they had agreed to settle for when the NEOC was involved. The attitude at the mediation merely served to polarize the sides. The mediator was not familiar with employment law and due to the fact that he was unable to state any opinions as to the merits of the case both sides became more firmly entrenched. The mediation took four hours, most of which was spent with defendants attempting to get in touch with the insurance company and corporate officials who could resolve the case. Plaintiff considered that process to be a waste of his time and money."

"It has been my experience that the concept of "interest based" negotiation is workable within the federal system but not in the mediation process. I have found settlement conferences with the judge or magistrate to be much more effective in resolving matters and bringing people to settlement. It is my belief that the settlement conference method works better because the judge/magistrate is more familiar with the law in that area and is more able to challenge the beliefs of both sides as it relates to their respective interests. I have not always successfully negotiated the settlement at a settlement conference but I have always believed they were of value. I cannot say the same for mediation when everyone leaves without any re-thinking of their position."

"This was not an unbiased mediation. The Plaintiff's outlook on the case was "buoyed" by the whole ordeal. Arguments of Defendant and it's counsel were not treated with respect. The response bordered on ridicule. Magistrate Piester's settlement conference went a long way toward getting this done. That's because he gave respect to and challenged both sides of the case."

"Plaintiff wanted more after the mediation. Plaintiff's counsel was jubilant. It was a waste of Plaintiff's time and money."

"It doesn't work when the only interest at issue is the amount of money to receive. In FELA cases with union designated counsel, that is the driving interest."

Centers --"No Effect":

"The mediation was not successful at all; in part, because the defendant's first attorney was not familiar with employment law."

"The mediator was not effective because she did not have sufficient experience in Title VII litigation."

"This case did not settle because of the mediation."

"This case did not settle in spite of the mediation."

"While the case didn't settle because of mediation, I think the mediation helped get the case settled."

"I strongly favor the concept of "interest-based" mediation. I think it can be very helpful."

"The defense lawyer, _____, wasn't going to agree, no matter what. A mediation, with more labor experience might have been helpful."

"Settlement was reached because Wells Fargo bought the Overland Bank and ceased using the trade name that was the center of the dispute."

"I think the concept has merit (regarding "interest-based" mediation)."

"We reached agreement during mediation that mediator later reduced to writing but plaintiff declined to accept."

"The defendant remained adamant in its position throughout. Thus, there wasn't chance for settlement. After mediation, the plaintiff was angry which made settlement extremely unlikely."

"I think that if both sides really want a settlement, mediation provides a mean to reach a settlement much sooner. However, if one or both parties is inflexible, I do see that mediation will aid any."

"Mediation caused attitudes and positions to become more entrenched....Mediator came in without adequate preparation or tenacity to tell parties the strengths and weaknesses of their positions."

Private – "Because Of":

"I believe the positions expressed in the mediation were a catalyst to settlement. The parties got a good sense for the merits and the middle ground through the mediation, although it took some time thereafter to bring the parties closer together."

"_____ did a very nice job mediating this case. Though it didn't settle at mediation, I thought that she laid the groundwork for the case to settle. The Defendants came down substantially from the last offer at the mediation."

"The mediation was helpful at getting the client to better understand the process and the factual and legal issues. It undoubtedly facilitated the settlement process."

"The parties needed to confront one another - with counsel present, to discuss formally their grievances. At the mediation, the outline of a general agreement was reached."

"In this instance it had some use, because the parties, practically, will come in contact with each other in the future because of their overlapping duties regarding child care, under state supervision."

"Plaintiff's resolve softened as time approached."

Private--"In Spite Of":

No comments received.

Private—"No Effect":

"The mediation was good. It allowed the parties to be face to face. Our client was not insured for the plaintiff's claim and was not well off. This was the major obstacle in settling with the plaintiff. _____ died several months after the case was settled."

"The mediation may have been a little early in the process. About one month before trial we began talking seriously about a settlement package that would meet _____ retirement concerns. After much work _____ and I were able to get the matter settled in a late night telephone conversation. I don't believe there was any impact on settlement because of the prior attempt of mediation."

"[Plaintiff] had several concerns about retirement benefits, so we structured the settlement to address those issues."

"Defendant was allowed to have low level human resource person come with counsel ("no checkbook"). S.J. was pending so the timing wasn't right for them."

"Interest based doesn't work with the railroad or an insurance co."

"Resolution of case was a result of medical and vocational developments subsequent to mediation."

"In some cases it seems to work better than others - depending primarily on the attitudes of the attorneys involved – some are apparently not willing to surrender control to the client whose interests are at stake."